Google Inc. et al v. Egger et al

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# EXHIBIT B

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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| **ELECTRONIC FRONTIER FOUND.,** | ) | |
| **Plaintiff,** | ) | **Civil Action No.** |
| | ) | |
| **v.** | ) | |
| | ) | |
| | ) | |
| | ) | |
| **Defendants** | ) | |
| | ) | |

DECLARATION OF CARL J. NICHOLS

I, CARL J. NICHOLS, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the Principal Deputy Associate Attorney General of the United States Department of Justice, and have served in that capacity since May 2008. From March 2005 through April 2008, I served as the Deputy Assistant Attorney General for the Federal Programs Branch of the Civil Division of the Department of Justice. In both capacities, I have been actively involved in litigating various cases filed after the public disclosure of the Terrorist Surveillance Program ("TSP"), including the numerous putative class actions against certain telecommunications companies alleging that those companies provided unlawful assistance to the Government following the attacks of September 11, 2001.

2. I respectfully submit this declaration in support of Defendants' Motion for Summary Judgment.

**I. Lawsuits Concerning Alleged Post-9/11 Intelligence Activities.**

3. In December 2005, following media reports of certain post-September 11, 2001 intelligence gathering activities, the President explained publicly that, following the attacks of September 11, 2001, he had authorized the National Security Agency ("NSA") to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. Thereafter, and following additional news articles, close to fifty lawsuits were filed against both the Government and certain telecommunications carriers challenging the TSP and other alleged intelligence activities. I describe these lawsuits, as well as investigations by state regulatory bodies and attorneys general into related matters, below.

A. Lawsuits Against Telecommunications Companies

4. Beginning on February 22, 2006, more than forty (40) putative class action complaints were filed in numerous district courts across the country against various telecommunications companies. All of those complaints alleged (with minor variations) that the telecommunication companies provided the content and/or records of plaintiffs' telephone and internet communications records to the NSA in violation of various federal and state statutes as well as the Constitution of the United States. The complaints sought various forms of relief, including injunctive relief prohibiting the defendant companies from providing the alleged assistance to the Government; declarations that the alleged assistance was unlawful; and/or substantial monetary damages.

5. These cases were a matter of significant concern to the United States and the Department of Justice for a number of reasons including, *inter alia,* the risk of unauthorized disclosure of intelligence information, sources, and methods confirming or denying the alleged

activities, as well as the risk that private companies might be less willing to provide assistance to the intelligence community simply because they had been sued for allegedly assisting the United States following the attacks of September 11. Accordingly, on May 13, 2006, the United States moved to intervene in the first case that had been filed against a telecommunications company, *Hepting v. AT&T Corp*., No. 06-0672 (N.D. Cal.), which alleged that AT&T's had provided unlawful cooperation with several alleged foreign-intelligence activities. The United States sought intervention for the purpose of seeking dismissal of the action or, in the alternative, summary judgment based on the United States' assertion of the state secrets and other privileges. In particular, the United States asserted the state secrets privilege through a declaration from the Director of National Intelligence, and asserted various statutory privileges through that declaration and a separate declaration from the Director of the National Security Agency. The United States explained in those declarations, as well as in public and *in camera, ex parte* briefs, that the disclosure of the information to which these privilege assertions apply would cause exceptionally grave harm to the national security of the United States. The district court (Chief Judge Vaughn Walker) granted the United States' motion to intervene on June 23, 2006, but on July 20, 2006, denied the United States' dispositive motions (as well as the dispositive motions filed by AT&T). *See Hepting v. AT&T*, 439 F. Supp. 2d 974 (N.D. Cal. 2006). The United States and AT&T filed an interlocutory appeal from that decision. After briefing and oral argument, on August 21, 2008, the Ninth Circuit remanded the case to the district court in light of the FISA Amendments Act of 2008 (which I discuss below, *see infra* at pp. 6-9).

6. Similarly, on June 30, 2006, the United States moved to intervene in *Terkel v. AT&T Inc*., No. 06C 2837 (N.D. Ill. filed May 22, 2006), a case seeking to enjoin AT&T's

purported cooperation with alleged foreign-intelligence activities of the NSA. As in the *Hepting* case, the United States moved to intervene for the purpose of seeking dismissal based on the United States' assertion of the state secrets and other privileges by the Director of National Intelligence and the Director of the NSA. After granting the United States' motion to intervene on July 6, 2006, , the district court dismissed the *Terkel* action on July 25, 2006. *See Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006).

7. At least thirty-eight (38) other similar cases were filed against telecommunications companies. Accordingly, on May 24, 2006, Verizon (another defendant) filed a motion with the Judicial Panel on Multidistrict Litigation ("JPML") for an order pursuant to 28 U.S.C. § 1407, transferring all of the cases against telecommunications carriers to a single district court for consolidated and coordinated pretrial proceedings. The United States filed briefs with the JPML in support of Verizon's motion, and on August 9, 2006, the JPML transferred all of the cases pending against telecommunications companies to Chief Judge Vaughn Walker in the Northern District of California, where the *Hepting* case was already pending. *See In re National Sec. Agency Telecommunications Records Litig.*, 444 F.Supp.2d 1332 (J.P.M.L. 2006).

8. Following transfer of these cases, on April 20, 2007, the United States filed a stipulation and motion to intervene in the various cases against Verizon and MCI, which by Court Order had been consolidated into a single Master Complaint. As in *Hepting* and *Terkel*, the United States sought to intervene for the purpose of seeking dismissal based on the United States' assertion of the state secrets and other privileges by the Director of National Intelligence and the Director of the NSA. On April 20, 2007, the court granted the Government's motion to

intervene in all Verizon/MCI cases. Although the district court heard argument on the United States' (and Verizon/MCI's) dispositive motions, it did not decide them, and on March 31, 2008, they were administratively terminated.

9. During this period, the United States did not have to intervene in cases brought against other companies because they were either stayed by stipulation or voluntarily dismissed.

B. State Investigations

10. Beginning in May 2006, various state governments commenced investigations into whether certain telecommunications carriers doing business in those states had assisted NSA in certain alleged intelligence activities. Like the private cases against the telecommunications carriers, those state investigations threatened the disclosure of intelligence information, sources and methods that would confirm or deny the alleged activities.

11. Following numerous attempts to explain to these states that their investigations unconstitutionally infringed on the activities of the federal government and were otherwise unlawful, five states – New Jersey, Connecticut, Vermont, Maine, and Missouri – refused to dismiss or otherwise halt their investigations. Accordingly, the United States sued each of those five states to enjoin their investigations. Those lawsuits, as well as a sixth lawsuit filed by Missouri against certain telecommunications companies, were also transferred to the Northern District of California for coordination with the other cases in *In re National Sec. Agency Telecommunications Records Litig.*, 444 F.Supp.2d 1332 (J.P.M.L. 2006).

12. On July 24, 2007, Chief Judge Walker denied the parties' cross-motions for summary judgment in light of the then-pending appeal in *Hepting*. *See In re National Sec. Agency Telecommunications Records Litig.*, 2007 WL 2127345 (N.D. Cal. 2007).

C. Lawsuits Against the Government

13. In addition to the cases against the telecommunications carriers and cases involving the states, following the public disclosure of the TSP, lawsuits were filed against government defendants. Plaintiffs in these cases are individuals and organizations who allege either that they have been subject to surveillance or that they face a great likelihood of being subject to the challenged surveillance program because they make frequent calls and send emails to overseas destinations where terrorists might be located. *See, e.g., American Civil Liberties Union, et al. v. National Security Agency, et al.*, 493 F. 3d 644 (6th Cir. 2007); *Center for Constitutional Rights, et al. v. Bush, et al.*, No. 06-cv-313 (S.D.N.Y.); *Al-Haramain Islamic Foundation v. Bush,* 507 F.3d 1190 (9th Cir. 2007); *Shubert v. Bush, et al.*, No. 06-cv-02282 (E.D.N.Y.); *Guzzi v. Bush, et al.*, No. 06-cv-0136 (N.D. Ga.). Several of those lawsuits were transferred to the Northern District of California for coordination with the other cases in *In re National Sec. Agency Telecommunications Records Litig.*, 444 F.Supp.2d 1332 (J.P.M.L. 2006). In four of the cases, the United States asserted the state secrets privilege; one has been dismissed (*ACLU v. NSA*); one is on remand after an appeal to the Ninth Circuit (*Al-Haramain*); and three are pending in the Northern District of California (*CCR*, *Shubert*, and *Guzzi*).

## II. The FISA Amendments Act of 2008.

14. Following the public disclosure of the Terrorist Surveillance Program in December 2005, Congress conducted extensive oversight of that Program, and also began to consider the need to modernize the Foreign Intelligence Surveillance Act ("FISA"). Over the next two years, numerous Executive Branch officials – including a number of senior officials from the Department of Justice – testified at public and classified hearings and provided

extensive briefings to members of Congress and their staffs concerning the need to update FISA, as well as whether legislation should be enacted that would protect telecommunications carriers from litigation alleging they had provided assistance to the Government following the attacks of September 11, 2001.

15. On July 10, 2008, Congress passed the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2467, Title II, § 201 (July 10, 2008) ("FISA Amendments Act of 2008" or "Act"). Title I of the Act establishes new procedures to facilitate the targeting of communications of persons reasonably believed to be outside the United States in order to acquire foreign intelligence information. *See* 50 U.S.C. §§ 1881a-1881g.

16. Of more relevance here, Title II provides protection from civil liability for electronic communication services providers alleged to have furnished assistance to an element of the intelligence community, as well as specific procedures for implementing statutory defenses in response to actions brought against such providers. *See* 50 U.S.C. §§ 1885, 1885a. In enacting Title II, Congress was well aware of the numerous class actions against telecommunications carriers that had been consolidated in *In re National Sec. Agency Telecommunications Records Litig.* The Senate Select Committee on Intelligence ("SSCI"), which had worked closely with the Executive Branch in crafting appropriate legislation, concluded that "electronic surveillance for law enforcement and intelligence purposes depends in great part on the cooperation of the private companies that operate the Nation's telecommunication system," *see* S. Rep. 110-209 Accompanying S. 2248, Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2007, Senate Select Committee on Intelligence

("SSCI Report") (Exhibit 1 hereto), at 9, and that, absent protection from liability for any assistance provided in the extraordinary period following the 9/11 attacks, "the private sector might be unwilling to cooperate with lawful Government requests in the future" and the "possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation." *Id.* at 10. Accordingly, Congress determined that certain statutory defenses, together with special procedures for implementing them, were warranted in cases against telecommunications carriers like those pending in *In re National Sec. Agency Telecommunications Records Litig.*, 444 F.Supp.2d 1332 (J.P.M.L. 2006).

17. In particular, Congress provided that a civil action alleging that an electronic communication service provider assisted the Government with intelligence activities "shall not lie or be maintained" and "shall be promptly dismissed" if the Attorney General certifies that one of several possible circumstances exist, including that the provider did not provide the alleged assistance, *see id.* § 1885a(a)(5); that the provider assisted the Government subject to an order of the Foreign Intelligence Surveillance Court ("FISC") or other certifications or directives authorized by statute, *see id.* § 1885a(a)(1)-(3); or that any assistance provided was subject to written requests indicating that the assistance was designed to detect and prevent a terrorist attack on the United States, was authorized by the President after the 9/11 attacks, and had been determined to be lawful. *See id.* § 1885a(a)(4). Congress also sought to "expand judicial review to an area that may have been previously non-justiciable" because of the Government's prior assertion of the state secrets privilege assertion, SSCI Rep. 110-209 at 12, by providing that cases could not be dismissed unless the Court finds that the Attorney General certification is supported by substantial evidence provided to the Court under Section 802.

18. These provisions of the Act thus reflect Congress's fundamental policy judgment that, in the unique historical circumstances after the 9/11 attacks, any assistance furnished by electronic communication service providers to the intelligence community was done in good faith and pursuant to specific written requests, and therefore should not subject those providers to burdensome litigation in which enormous sums of damages are sought.

19. On September 19, 2008, the Attorney General certified that all of the claims in the cases against telecommunications carriers that I describe above, *see supra* at pp. 2-4, fall within at least one of the circumstances set forth in Section 802(a). *See* 50 U.S.C. §§ 1885, 1885a. Accordingly, the United States moved to dismiss (or in the alternative for summary judgment) all of those cases based on the Attorney General's certification. In response, Plaintiffs have argued that Title II of the FISA Amendments Act of 2008 is unconstitutional, and also have argued that the Attorney General's certification is not supported by substantial evidence. On December 2, 2008, Chief Judge Walker heard oral argument on the Government's motion.

## III. The United States' Common Interest With Telecommunications Carriers

20. The Department of Justice considers communications with a third party sharing a common interest in a legal matter with the United States, and that are otherwise protected by the attorney-client privilege, work product doctrine, or deliberative process privilege, to be exempt from civil discovery and therefore properly withheld under FOIA exemption (b)(5).

21. The United States has always understood that it shares common interests with the telecommunications carriers in the various cases described above and has acted accordingly. The Government's interests in those cases include protecting against the unauthorized disclosure in litigation of intelligence activities, information, sources, and methods; ensuring that private

companies do not discontinue any assistance they may provide to the Government simply because they have been sued for allegedly providing assistance following the attacks of September 11, 2001; and, more recently, defending the constitutionality of Title II of the FISA Amendments Act (and its application to the Attorney General's recent certification). These interests have been set forth in numerous pleadings filed in the cases described above.

22. Shortly after the filing of the *Hepting* case in February 2006, a number of lawyers from the Department of Justice met with inside and outside counsel for AT&T, which at that time was the only telecommunications carrier that had been named as a defendant. During that meeting, the participants expressly agreed that exchanges of information among Executive Branch lawyers and lawyers for AT&T would be privileged under the common interest privilege. Thereafter, as additional lawsuits were filed against other telecommunications companies (such as Verizon/MCI, Sprint, and others), lawyers from the Executive Branch communicated frequently with lawyers from those companies. In subsequent meetings involving those additional defendants, the participants expressly agreed that exchanges of information among Executive Branch lawyers and lawyers for these telecommunications companies would be privileged under the common interest privilege. Accordingly, to the extent that lawyers from the Executive Branch communicated in writing with lawyers for telecommunications companies, those communications often bore the notations "Privileged & Confidential" and/or "Subject to Common Interest Privilege."

23. As I noted above, *see supra* at pp. 6-7, beginning in 2006, Congress began to consider whether it should modernize FISA, including whether it should enact legislation that would protect telecommunications carriers from litigation alleging they had provided assistance

to the Government following the attacks of September 11, 2001. Because any such legislation would have an immediate impact on the cases consolidated *In re National Sec. Agency Telecommunications Records Litig.*, 444 F.Supp.2d 1332 (J.P.M.L. 2006), lawyers from the Executive Branch communicated with lawyers for certain telecommunications carriers concerning the possibility of such legislation and how it would affect the pending cases. I therefore regarded communications relating to such legislation, which was ultimately passed as part of the FISA Amendments Act of 2008, as covered by the common interest privilege. In fact, a number of communications regarding this subject bear the markings "PRIVILEGED & CONFIDENTIAL" or "SUBJECT TO COMMON INTEREST PRIVILEGE."

I declare, under penalty of perjury, that the foregoing is true and correct.

EXECUTED on this 8th day of December, 2008,

*/s/ Carl J. Nichols*
Carl J. Nichols
Principal Deputy Associate Attorney General